(14)

FILED
MAY 22 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-380

IN THE SUPREME COURT OF THE UNITED STATES

ALBERTO R. GONZALES, ATTORNEY GENERAL,

Petitioner,

v.

LEROY CARHART, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF *AMICI CURIAE* OF THE UNITED STATES CONFERENCE OF CATHOLIC BISHOPS AND OTHER RELIGIOUS ORGANIZATIONS IN SUPPORT OF PETITIONER

Mark E. Chopko*
General Counsel
Michael F. Moses
Associate General Counsel
United States Conference
of Catholic Bishops
3211 Fourth St., N.E.
Washington, DC 20017
(202) 541-3300

*Counsel of Record

May 22, 2006

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	4
I. Neither *Stenberg* nor *Casey* Controls the Outcome of this Case	4
II. Even if this Court's Abortion Jurisprudence Were Applicable, the Challenged Statute Should be Upheld as a Permissible Regulation Under *Casey*	7
III. This Court's Abortion Jurisprudence Needs to be Reexamined	12
CONCLUSION	19

TABLE OF AUTHORITIES

PAGE

CASES:

Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) 8

Ayotte v. Planned Parenthood of Northern New England, 126 S.Ct. 961 (2006) 12, 13

Board of Education v. Mergens, 496 U.S. 226 (1990) 9

Brown v. Board of Education, 347 U.S. 483 (1954) 14

Carhart v. Gonzales, 413 F.3d 791 (8th Cir. 2005). . . 18

Eisenstadt v. Baird, 405 U.S. 438 (1972) 8

Fletcher v. Peck, 6 Cranch 87 (1810) 19

Griswold v. Connecticut, 381 U.S. 479 (1965) 15

Jacobson v. Massachusetts, 197 U.S. 11 (1905) . . . 16

Legal Tender Cases, 12 Wall. 457 (1871) 19

Loving v. Virginia, 388 U.S. 1 (1967) 15

Maher v. Roe, 432 U.S. 464 (1977) 7

McCorvey v. Hill, 385 F.3d 846 (5th Cir. 2004) . . . 17

Meyer v. Nebraska, 262 U.S. 390 (1923) 15

National Abortion Federation v. Ashcroft,
330 F.Supp.2d 436 (S.D.N.Y. 2004). 11

National Abortion Federation v. Gonzales,
437 F.3d 278 (2d Cir. 2005) 4, 11, 13, 18

Planned Parenthood v. Casey, 505 U.S. 833 (1992) . *passim*

Planned Parenthood v. Danforth, 428 U.S. 52 (1976) . 11, 16

Roe v. Wade, 410 U.S. 113 (1973) . . . . . *passim*

Rostker v. Goldberg, 453 U.S. 57 (1981) 9

Skinner v. Oklahoma, 316 U.S. 535 (1942) 15

Stenberg v. Carhart, 530 U.S. 914 (2000) . . . . . *passim*

Thornburgh v. American College of Obstetricians
and Gynecologists, 476 U.S. 747 (1986) 8

Turner Broadcasting System v. FCC,
520 U.S. 180 (1997) 9

United States v. Oakland Cannabis Buyers' Co-op,
532 U.S. 483 (2001) 10

United States v. Salerno, 481 U.S. 739 (1987) . . 12

Vacco v. Quill, 521 U.S. 793 (1997) 10

Washington v. Glucksberg, 521 U.S. 702 (1997). 6, 10, 16

Webster v. Reproductive Health Services, 492 U.S. 490 (1989) 11

Women's Med. Center of Northwest Houston v. Archer, 159 F.Supp.2d 414 (S.D. Tex. 1999), *aff'd in part, rev'd in part*, 248 F.3d 411 (5th Cir. 2001) 17, 18

STATUTES:

Neb. Rev. Stat. § 28-328(1) 4

Tex. Rev. Civ. Stat. art. 4512.5 6

18 U.S.C. § 1531(b)(1)(A) 4

Pub. L. No. 108-105, 117 Stat. 1201 (2003) . . . 4, 6, 8, 9

LEGISLATIVE HISTORY:

H.R. Rep. No. 107-186 (2001) 5

Testimony of Kellyanne Conway, Constitution Subcommittee of the House Judiciary Committee (March 2, 2006) 13, 14

MISCELLANEOUS:

Erika Bachiochi (ed.),
THE COST OF CHOICE: WOMEN EVALUATE
THE IMPACT OF ABORTION (2004) 17

Jack M. Balkin (ed.), WHAT *ROE V. WADE*
SHOULD HAVE SAID: THE NATION'S TOP
LEGAL EXPERTS REWRITE AMERICA'S MOST
CONTROVERSIAL DECISION (2005) 16

James Tunstead Burtchaell,
RACHEL WEEPING (1982) 5

Center for Gender Equality, *Progress and Perils:*
How Gender Issues Unite and Divide Women,
Part Two (April 7, 2003) 14

M. Cuttini, *et al.*, *End-of-life Decisions in*
Neonatal Intensive Care: Physicians'
Self-reported Practices in Seven European
Countries, 355 The Lancet 2112
(June 17, 2000) 5

Elizabeth Day, *Infanticide is Justifiable*
in Some Cases, Says Ethics Professor,
The Telegraph (Jan. 25, 2004) 5

John Hart Ely, *The Wages of Crying Wolf:*
A Comment on Roe v. Wade, 82 Yale L.J.
920 (1973) 14

H. Tristram Engelhardt, "Ethical Issues in Aiding the Death of Young Children," in Marvin Kohl (ed.), BENEFICENT EUTHANASIA 180 (1975) 5

Lawrence B. Finer, *et al.*, *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 Perspectives on Sexual and Reproductive Health 110 (Sept. 2005) 14

Clarke D. Forsythe & Stephen B. Presser, *The Tragic Failure of Roe v. Wade: Why Abortion Should be Returned to the States*, 10 Tex. Rev. L. & Politics 87 (Fall 2005) . . . 17

Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. Rev. 375 (1985) 16

Michael F. Greene, *Fatal Infections Associated With Mifepristone-Induced Abortion*, 353 N. Eng. J. Med. 2317 (Dec. 1, 2005). 11

Los Angeles Times Poll, Study #514 (Jan. 18, 2005) 13

Michael F. Moses, *Casey and its Impact on Abortion Regulation*, 31 Fordham Urban L. J. 805 (March 2004) 13

Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 Notre Dame L. Rev. 995 (2003) 17

David C. Reardon, *et al.*, *Deaths Associated with Abortion Compared to Childbirth – A Review of New and Old Data and the Medical and Legal Implications*, 20 J. Contemp. Health L. & Policy 279 (2004) 17

Peter Singer, *Sanctity of Life or Quality of Life?*, 72 Pediatrics 128 (July 1983) 5

Tim Swarens, *Live Birth Shocked a Nurse*, The Indianapolis Star (Dec. 3, 1999) 5

Michael Tooley, ABORTION AND INFANTICIDE (1983) 5

Laurence H. Tribe, *Toward a Model of Roles in the Due Process of Life and Law*, 87 Harv. L. Rev. 1 (1973) 14

Eduard Verhagen & Pieter J.J. Sauer, *The Groningen Protocol – Euthanasia in Severely Ill Newborns*, 352 N. Eng. J. Med. 959 (March 10, 2005) 5

Benjamin Wittes, *Letting Go of Roe*, Atlantic Monthly (Jan./Feb. 2005) 14

INTEREST OF *AMICI*[1]

The United States Conference of Catholic Bishops and other religious organizations unite here as *amici curiae* in support of the Petitioner, Alberto R. Gonzales, Attorney General of the United States.

Individual statements of interest are provided in the Appendix.

SUMMARY OF ARGUMENT

Stenberg v. Carhart, 530 U.S. 914 (2000), does not control the outcome of this case. The statutes at issue here and in *Stenberg* differ in two crucial respects. First, federal law bans a different procedure. Unlike the Nebraska law invalidated in *Stenberg*, the federal ban protects the life of an unborn child that is substantially *outside* his or her mother's body at specified anatomical points. Second, Congress made factual findings that address the precise question whether an exception to the ban is necessary to protect the mother's health.

Indeed, that this case involves a living child substantially outside his or her mother's body places the challenged statute outside the scope of this Court's abortion precedents. *Roe v. Wade*, 410 U.S. 113 (1973), did not decide the constitutionality of a ban on taking the life of a child in the process of being born. 410 U.S., at 117 n.1. No subsequent decision of this Court, not even *Stenberg*, has considered the constitutionality of a ban on

---

[1]Pursuant to this Court's Rule 37.6, counsel for a party did not author this Brief in whole or in part. No person or entity, other than the United States Conference of Catholic Bishops, made a monetary contribution to the preparation or submission of this Brief. The parties have consented to the filing of this Brief. Letters of consent are filed herewith.

taking the life of a child substantially outside his or her mother's body. There is plainly no basis for saying that such conduct should enjoy constitutional protection. Congress could legitimately conclude, as it did here, that the challenged ban is necessary to preserve the distinction between abortion and infanticide and to prevent the latter.

Even if this Court's abortion jurisprudence were applicable, the statute should be upheld because it is a permissible regulation that squares with this Court's decision in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). *Casey* permits more regulation of abortion, not less, than had been permitted under previous decisions. The challenged ban does not prohibit a single abortion or impede access to abortion. It prohibits only a method of abortion. Congress found that this particular method of abortion was not medically necessary and, indeed, posed significant maternal health risks. Those factual findings are entitled to judicial deference here as in any other context. To hold otherwise simply because this case involves abortion would inexplicably accord abortion a constitutional status not enjoyed even by interests the Constitution explicitly protects.

Stenberg does not require a different result. That case, which purports to be a straightforward application of *Casey*, did not rule that any division of medical authority must be resolved against the government. For two reasons, this Court should clarify that that is not the law and that *Stenberg* intended no such rule. First, such a rule would *create* health risks by forbidding government to regulate a medical procedure whenever even a small group of physicians dissents from the view that the procedure is dangerous. Second, it would be patently absurd. It would, for example, require invalidation of a ban on marijuana use if some doctors concluded that such use had medical value – a conclusion wholly at odds with how legislation and

administrative regulations are crafted and reviewed.

Finally, if and to the extent this Court's abortion jurisprudence is implicated at all, this case underscores several factors that compel re-examination of that jurisprudence.

First, the ongoing supervisory role that this Court has assumed in abortion disputes continues to be a source of division and unpredictability for the other two branches of government.

Second, a large number of respected scholars and legal commentators on both sides of the abortion question view *Roe* as indefensible on its original terms. The wide-ranging and continuing search by abortion proponents, and even members of this Court, for an alternative legal justification for that decision is itself a sign that abortion policy is best suited to the legislative branch, not a matter of constitutional interpretation.

Third, *Roe* impedes an essential function of government by forbidding it to restrain private killing. The result has been a catastrophic loss of innocent human life.

Fourth, the factual assumptions underlying *Roe* are now disputed with evidence not available to this Court at the time *Roe* was decided.

On all four counts, the error of *Roe*, a decision already partly overruled in *Casey*, needs to be more fully and explicitly acknowledged and corrected.

ARGUMENT

I. Neither *Stenberg* nor *Casey* Controls the Outcome of this Case.

Because the Nebraska statute invalidated in *Stenberg v. Carhart*, 530 U.S. 914 (2000), and the federal statute at issue here both prohibit procedures bearing the name "partial-birth abortion," one might naturally infer that those procedures are indistinguishable. That would be a mistake.

Nebraska prohibited a procedure in which an infant's life was taken after a substantial portion of the child's body was delivered into the vagina. So defined, the procedure "could have occurred completely within the body of the mother." *National Abortion Federation v. Gonzales*, 437 F.3d 278, 298, 310 (2d Cir. 2005) (Straub, J., dissenting), citing Neb. Rev. Stat. § 28-328(1). The federal Partial-Birth Abortion Ban Act of 2003 concerns a procedure in which the infant is killed after being delivered substantially *outside* the mother's body at specified anatomical points. 18 U.S.C. § 1531(b)(1)(A). The banned procedure is not only different from Nebraska's, but closer to actual infanticide than any practice previously reviewed by this Court.

A second crucial distinction between this case and *Stenberg* is the presence here of factual findings that explicitly address the concerns raised by this Court in *Stenberg*. Congress found, based in part on evidence "much of which was compiled after the district court hearing in *Stenberg*, and thus not included in the *Stenberg* trial record," that partial-birth abortion is "never medically necessary" and, indeed, "poses significant health risks" to women. Pub. L. No. 108-105, § 2, 117 Stat. 1201, 1202 (2003). Congress also found a "disturbing similarity" between

the banned procedure and the killing of a newborn infant. *Id.* at 1206. Credible reports of infanticide in the United States[2] and other Western democracies,[3] and endorsement of this practice in some academic circles,[4] give legitimacy to these concerns.

---

[2] *E.g.*, Tim Swarens, *Live Birth Shocked a Nurse*, The Indianapolis Star (Dec. 3, 1999) (setting out the report of an employee of a company that collects fetal tissue that a physician "killed the babies after they were born"); James Tunstead Burtchaell, RACHEL WEEPING 288 (1982) (doctors charged with manslaughter following infant deaths allegedly caused by strangulation or failure to provide care following birth). *See* H.R. Rep. No. 107-186 (2001) (documenting cases in the United States and abroad in which children intended to be aborted are born alive and left to die).

[3] *See* Eduard Verhagen & Pieter J.J. Sauer, *The Groningen Protocol – Euthanasia in Severely Ill Newborns*, 352 N. Eng. J. Med. 959 (March 10, 2005). It is reported that 15 to 20 cases of euthanasia involving newborn infants occur annually in the Netherlands. *Id.* at 961. In the last seven years, 22 such cases have been reported to law enforcement authorities in that country; no prosecutions have resulted. *Id.* The administration of drugs with the intent of ending the life of a newborn is reported to occur with substantial frequency in France. M. Cuttini, *et al.*, *End-of-life Decisions in Neonatal Intensive Care: Physicians' Self-reported Practices in Seven European Countries*, 355 The Lancet 2112 (June 17, 2000).

[4] *E.g.*, Peter Singer, *Sanctity of Life or Quality of Life?*, 72 Pediatrics 128-29 (July 1983); Michael Tooley, ABORTION AND INFANTICIDE (1983); H. Tristram Engelhardt, "Ethical Issues in Aiding the Death of Young Children," in Marvin Kohl (ed.), BENEFICENT EUTHANASIA 180 (1975); Elizabeth Day, *Infanticide is Justifiable in Some Cases, Says Ethics Professor*, The Telegraph (Jan. 25, 2004) (citing the views of a member of the British Medical Association's ethics committee that it is not "plausible to think that there is any moral change that occurs during the journey down the birth canal," and that "there was no moral difference between aborting a foetus and killing a baby"), available at www.telegraph.co.uk/news/main.jhtml?xml=/news/2004/01/25/nbaby25.xml&sSheet=/news/2004/01/25/ixhome.html) (visited May 16, 2006). Congress was aware that some ethicists in this country have claimed that "parents should have the option to kill disabled or unhealthy newborn babies for a certain period after birth." H.R. Rep. No. 107-186, at 8 (2001); *see also id.* (rejecting a claim

Congress reasonably concluded that the practice of killing children substantially outside their mothers' bodies "promote[s] a complete disregard for infant human life that can only be countered by a prohibition of the procedure." *Id.* at 1206.

Nothing in this Court's previous decisions bars Congress from making these judgments. Neither *Roe v. Wade*, 410 U.S. 113 (1973), nor *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), nor *Stenberg*, nor any other decision of this Court, forbids legislatures to prohibit the killing of a child substantially *outside* his or her mother's body.

Roe speaks directly to this point. All that was challenged in that case was a Texas ban on abortion before the birth process begins. The plaintiff in *Roe* did not challenge a Texas law that made it unlawful "during parturition of the mother [to] destroy the vitality or life in a child in a state of being born and before actual birth." 410 U.S., at 117 n.1. That prohibition remains in effect to this day, having been recodified the year *Roe* was decided. Tex. Rev. Civ. Stat. art. 4512.5. This Court and the American public, then and now, have always understood *Roe* to involve the taking of life *in utero*.

Killing a child substantially outside his or her mother's body is not protected under this Court's abortion jurisprudence. And this Court should not extend that jurisprudence to include it. It does not fall within this Court's substantive due process jurisprudence as reiterated in *Washington v. Glucksberg*, 521 U.S. 702 (1997). It is patently absurd to contend that killing a child "just inches" from full delivery (Pub. L. No. 108-105, § 2, 117 Stat. 1201, 1206 (2003)), is "deeply rooted in this Nation's history and tradition." *Glucksberg*, 521 U.S., at 720-21. When

---

that "killing a disabled infant is not morally equivalent to killing a person").

subject to the "careful" and "precise" description mandated by *Glucksberg*, *id.* at 721-23, it is apparent that the conduct Congress prohibited, however characterized, cannot fairly be swept into the category of abortions to which this Court has given constitutional protection.

II. Even if this Court's Abortion Jurisprudence Were Applicable, the Challenged Statute Should be Upheld as a Permissible Regulation Under *Casey*.

This Court has always held that abortion is not an absolute right. *Roe v. Wade*, 410 U.S., at 159 ("The pregnant woman cannot be isolated in her privacy"); *Maher v. Roe*, 432 U.S. 464, 473 (1977) ("*Roe* did not declare an unqualified 'constitutional right to an abortion'"). In the years immediately following *Roe*, this Court issued a number of decisions that, as *Casey* later acknowledged, failed to give appropriate deference to the states' legitimate interests in regulating abortion. Seven justices in *Casey* concluded that this Court's earlier decisions had too severely and improperly restricted the states' power to regulate abortion. *Casey*, 505 U.S., at 871-78, 882 (joint opinion of O'Connor, Kennedy, and Souter, JJ.); *id.* at 944 (Rehnquist, C.J., joined by White, Scalia, and Thomas, JJ., concurring in the judgment in part and dissenting in part). The three-justice plurality, whose opinion on this issue, combined with the four justices who wanted to overrule *Roe* outright, is controlling, elaborated:

> [D]espite the protestations contained in the original *Roe* opinion to the effect that the Court was not recognizing an absolute right, 410 U.S., at 154-155, the Court's experience applying the trimester framework has led to the striking down of some abortion regulations which in no real sense deprived women of the ultimate decision

> [whether to have an abortion]. *Those decisions went too far* because the right recognized by *Roe* is a right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird*, 405 U.S. [438], at 453 [(1972)]. *Not all governmental intrusion is of necessity unwarranted*....

Casey, 505 U.S., at 875 (emphasis added). *Casey* itself (*id.* at 882) overruled *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986). *Casey* also rejected substantial portions of *Roe*, including the trimester framework and, significantly, *Roe*'s holding that abortion regulations were subject to strict scrutiny. *Id.* at 873-79.

Casey therefore restored to the states a power to regulate abortion that, by the plurality's own acknowledgment, had been eclipsed in decisions issued after *Roe*. *Stenberg* did "not revisit" *Casey*'s legal principles, but purports to be a "straightforward application" of *Casey*. *Stenberg*, 530 U.S., at 921, 938.

Even if the killing of a child substantially outside his or her mother's body could be likened to the procedures at issue in *Roe* and *Casey* so as to render those cases applicable, the federal partial-birth abortion ban would not run afoul of those decisions. First, the challenged law does not ban abortion, but rather one particular method. There is no constitutional requirement that the ban be accompanied by a "health" exception where, as here, Congress has reasonably concluded that the banned procedure is "never medically necessary" and, indeed, "poses significant health risks to a woman upon whom the procedure is performed...." Pub. L. No. 108-105, § 2, 117 Stat. 1201, 1202 (2003). Those findings were made after years of Congressional

hearings, including study, discussion and debate about the relative merits of the banned procedure. A legislature, not a court, is better equipped to amass and evaluate data bearing on broad and changing factual questions, and its conclusions are entitled to judicial deference. *Turner Broadcasting System v. FCC*, 520 U.S. 180, 195-96 (1997). Not according similar deference in this case simply because it involves abortion would give abortion an anomalous constitutional status, one not enjoyed even by interests that are explicitly protected by constitutional text. *Id.* at 195-96 (deferring to congressional findings in rejecting free speech challenge to FCC's "must-carry" rules); *Board of Education v. Mergens*, 496 U.S. 226 (1990) (deferring to congressional findings in rejecting Establishment Clause challenge to statute mandating equal access to school facilities for religious groups); *Rostker v. Goldberg*, 453 U.S. 57 (1981) (deferring to congressional findings in rejecting due process challenge to male-only draft registration).

Stenberg would not require invalidation of the federal ban even if that case were applicable. *Stenberg* did not rule, and cannot be read, as a substantive rule that *any* division of medical authority must be resolved against the government. For two reasons, this Court should clarify that that is not the law and that *Stenberg* intended no such result. First, such a rule would create health risks by forbidding government to regulate or ban a medical procedure whenever even a small group of physicians dissents from the view that the procedure is dangerous. Here, after hearing expert witnesses on both sides of the question, Congress found affirmatively that the banned procedure "*poses* significant health risks," not that it eliminates such risks. Pub. L. No. 108-105, § 2, 117 Stat. 1201, 1202 (2003) (emphasis added). Thus, *Stenberg*'s assumption that a "health" exception was necessary in that case to prevent health risks to some women

(530 U.S., at 931-38) here cuts in the opposite direction.

Second, to hold against the government simply because those challenging the Act present medical opinion that was considered and rejected by Congress would effectively nullify the government's ability to regulate, not only with respect to abortion specifically and medicine generally, but on a host of other controversial issues. For example, this Court has never suggested that whenever it bans a particular drug, Congress must allow a "health" exception if medical opinion is divided on whether the banned drug has legitimate medical uses. *Cf. United States v. Oakland Cannabis Buyers' Co-op*, 532 U.S. 483 (2001) (rejecting claim that there is an implied medical necessity exception to Congress's prohibition on the manufacture and distribution of marijuana). Indeed, the very point of regulation is to resolve such disagreements; if there were unanimity of medical opinion, there would be little need for regulation because compliance would be largely voluntary and universal. Similarly, there is no indication that this Court's decisions upholding statutory prohibitions of assisted suicide would have been decided differently had a "substantial" body of physicians believed that assisting suicide in some circumstances is a legitimate medical practice. *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Vacco v. Quill*, 521 U.S. 793 (1997). Indeed, as demonstrated by amicus filings in those cases, one finds what might be characterized as "substantial" medical opinion on both sides of the question (which is not to concede that all medical opinion on that issue was equally credible or entitled to the same weight).[5]

---

[5]Significantly, in one of three lawsuits challenging the federal partial-birth abortion ban, the lower court found that expert opinion in favor of partial-birth abortion was *not* credible, but rather was "incoherent," "only theoretical," or "false," and that the government's experts had "reasonably and effectively refuted Plaintiffs' proffered bases for the opinion that

The analysis does not change when the procedure under review involves the taking of nascent human life. If, for example, a legislature or administrative agency were reasonably to find (as well it might) that a surgical procedure or drug protocol, such as mifepristone (RU-486), is dangerous for women when used as an abortifacient, the Constitution, properly construed, would not prevent a legislature from banning its use for an abortion even if a substantial number of physicians held contrary views.[6] A moment's reflection confirms that if the mere presence of diverse medical opinion were sufficient to render a medical regulation unconstitutional, any number of reasonable medical regulations could not be upheld.

Failure to defer to the legislative branch here, as in any other medical context, would transform this Court and lower courts into an ongoing medical review board, a role this Court has properly disclaimed. *Webster v. Reproductive Health Services*, 492 U.S. 490, 519 (1989) (plurality opinion) (noting that the Court does not sit as the Nation's "*ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States"), *quoting Planned Parenthood v. Danforth*, 428 U.S. 52, 99 (1976) (White, J., concurring in the judgment in part, dissenting in part). As an intended "straightforward application" (*Stenberg*, 530 U.S., at

---

[partial-birth abortion] has safety advantages over other second-trimester abortion procedures." *National Abortion Federation v. Ashcroft*, 330 F.Supp.2d 436, 479 (S.D.N.Y. 2004); *see National Abortion Federation v. Gonzales*, 437 F.3d 278, 297 (2d Cir. 2006) (Straub, J., dissenting) (citing lower court findings).

[6] *See, e.g.*, Michael F. Greene, *Fatal Infections Associated with Mifepristone-Induced Abortion*, 353 N. Eng. J. Med. 2317-18 (Dec. 1, 2005) (concluding that the mortality rate for RU-486 may be ten times that of early surgical abortion).

938) of *Casey*, *Stenberg* does not purport to alter the respective roles of legislatures and courts in crafting and reviewing medical regulations, and should not now be read to create such a radical revision in the respective roles of Congress and the courts.

III. This Court's Abortion Jurisprudence Needs to be Reexamined.

This case underscores several factors that warrant reexamination of this Court's abortion jurisprudence.

Over time, this Court's treatment of abortion has followed a notably wavy line. In the years immediately following *Roe*, this Court scrutinized abortion so strictly that, as *Casey* later admitted, even reasonable legislation often fell before this Court's jurisprudential ax. *Casey* acknowledged that this Court had previously gone "too far" (505 U.S., at 875) in striking down reasonable abortion regulations, and that there are legitimate interests throughout pregnancy that justify such regulations. *Casey* rejected *Roe*'s strict scrutiny test in favor of a more lenient undue burden test. In the last decade, this Court has made only two substantive decisions on abortion. The first, *Stenberg*, claimed to apply *Casey* but in fact suggested a methodology that in some respects resembled the strict scrutiny that *Casey* rejected.[7] The second case, *Ayotte v. Planned Parenthood of*

---

[7]While *Stenberg* can be distinguished from the present case, it should be acknowledged that, notwithstanding its claim to be a "straightforward application" (530 U.S., at 938) of *Casey*, *Stenberg* undermines the jurisprudential goals announced in *Casey*. The *Casey* plurality adopted a test whose stated intent was to be less grudging of abortion regulation than the strict scrutiny test announced in, and applied in cases immediately following, *Roe*. *Casey*, 505 U.S., at 871-79. *Stenberg* nonetheless struck down a statute based on *speculative* harm to some *undetermined* number of women, without requiring a showing that the statute was unconstitutional in all its applications (*United States v. Salerno*, 481 U.S. 739, 745 (1987)), or

Northern New England, 126 S.Ct. 961 (2006), avoided any substantive ruling whatsoever but instead directed a remedy based on the mutual and overlapping concessions of the parties. Thus, this Court now has an opportunity to vindicate the *Casey* plurality's promise that legislatures should be freer to regulate abortion than had been the case in the years following *Roe*. *Cf.* Michael F. Moses, *Casey and its Impact on Abortion Regulation*, 31 Fordham Urban L. J. 805 (March 2004) (noting that lower courts continue to closely scrutinize abortion regulation despite *Casey*'s deference to reasonable legislative judgments).

Continued judicial oversight of abortion has had no institutional benefit for the Judicial Branch. Indeed, it has placed the Judiciary at the center of an ongoing governmental and cultural maelstrom unlike that found in any other area of contemporary jurisprudence in this generation.

Roe has never enjoyed wide currency among the American public, and today conflicts with prevailing public opinion.[8]

---

even a "large fraction" (*Casey*, 505 U.S., at 895) of cases. *See National Abortion Federation v. Gonzales*, 437 F.3d at 291, 293-96 (Walker, C.J., concurring) (criticizing *Stenberg* for requiring facial invalidation of a statute upon a speculative showing of harm even if, in the vast majority of cases, the statute's application would not lead to an unconstitutional result). That approach would seem to be strict scrutiny by another name. Given the intended role of *Casey* in the jurisprudence, any inconsistency between *Casey* and *Stenberg* should be resolved in favor of *Casey*.

[8]A majority of Americans (62 percent in one poll), including a majority of women, believe abortion should never be legal, or legal only when the mother's life is in danger or in cases or rape of incest. Testimony of Kellyanne Conway at 5, Constitution Subcommittee of the House Judiciary Committee (March 2, 2006), available at http://judiciary.house.gov/oversight.aspx?ID=218 (visited May 16, 2006), citing April 2005 poll by The Polling Company (showing 62%); Los Angeles Times Poll, Study #514 (Jan. 18, 2005), Question 65, available at http://www.latimes

Scholarship has been no less harsh in its reception of *Roe*. Indeed, the decision has frequently been criticized by scholars and commentators who *favor* legalized abortion.[9] Thus, unlike other landmark decisions of this Court,[10] *Roe* has never gained wide acceptance; indeed, opposition to the decision has only

---

interactive.com/pdfarchive/nationworld/la-011905poll1_pdf.pdf (visited May 16, 2006) (showing 53%); Center for Gender Equality, *Progress and Perils: How Gender Issues Unite and Divide Women, Part Two* (April 7, 2003) (conducted by Princeton Survey Research Associates), available at http://www.advancewomen.org/files/File/PDFs/PartTwo.pdf (accessed May 17, 2006). Such abortions represent only a miniscule fraction of abortions in the United States. Lawrence B. Finer, *et al.*, *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 Perspectives on Sexual and Reproductive Health 110 (Sept. 2005) (2004 survey reporting 1% of abortions for rape, less than 0.5% for incest, and 4% for broad "health" reasons but no specific claim of life endangerment). Only 30% of American women believe abortion should be "generally available." Center for Gender Equality, *Progress and Perils, supra*. Misreports of broad public support for *Roe* are usually based on poorly drafted polling questions, including questions about *Roe* itself which describe the decision inaccurately or not at all. Testimony of Kellyanne Conway, *supra*.

[9]Among the extensive literature, *see, e.g.*, Laurence H. Tribe, *Toward a Model of Roles in the Due Process of Life and Law*, 87 Harv. L. Rev. 1, 7 (1973) ("One of the most curious things about *Roe* is that, behind its own verbal smokescreen, the substantive judgment on which it rests is nowhere to be found"); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 947 (1973) (*Roe* is a "very bad decision" because "it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be"); Benjamin Wittes, *Letting Go of Roe*, Atlantic Monthly 48 (Jan./Feb. 2005) ("Since its inception *Roe* has had a deep legitimacy problem, stemming from its weakness as a legal opinion").

[10]*Cf. Brown v. Board of Education*, 347 U.S. 483 (1954). *Brown* was based on constitutional amendments expressly adopted to overcome the problem of socially-institutionalized racial inequality.

grown. *See* note 8, *supra*. Perhaps the best evidence for this is that political majorities across the Nation continue to regulate and, to the extent permitted by this Court, restrict abortion. Fueling these legislative initiatives is a lively and widespread sense among a very large segment of Americans that *Roe* is neither good public policy nor grounded in the Constitution.

Abortion proponents, and even members of this Court, have sought alternative justifications for *Roe*, which itself suggests that *Roe* is not plainly rooted in the Constitution. Few things illustrate this better than *Casey*. The plurality opinion in that case devotes more space to its discussion of *stare decisis* than to the substantive basis for the abortion right.[11] Indeed, the three justices in the plurality were unable to say that *Roe* was correctly decided as an original matter.[12] Four other justices said *Roe* was

---

[11]The plurality's substantive discussion of liberty relies upon previous decisions on marriage and procreation, but no explanation is given, there or in *Roe*, as to why an abortion right follows from these other protected areas. Because abortion involves an intentional act that is always directed toward taking the life of an unborn child, by its nature it is not only different from marriage and procreation, but their diametric opposite. *Compare Skinner v. Oklahoma*, 316 U.S. 535 (1942) (right to procreate), and *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to contracept), with *Roe* (right to take the life of an unborn child); and *compare Loving v. Virginia*, 388 U.S. 1 (1967) (right to marry), and *Meyer v. Nebraska*, 262 U.S. 390 (1923) (right to direct the care and upbringing of one's children), with *Casey*, 505 U.S., at 898 (holding that a husband has no right to notice of his wife's decision to abort their unborn child). Moreover, a number of the historical decisions involved a form of relational intimacy which was, at its core, beyond the power of government to invade. *E.g.*, *Meyer*, 262 U.S. 390; *Griswold*, 381 U.S. 479.

[12]505 U.S., at 871 ("We do not need to say whether each of us, had we been Members of the Court when the valuation of the state interest [in protecting human life] came before it as an original matter, would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability.... The matter is not before us in the

incorrectly decided.[13] Continued attempts to find alternative justifications for *Roe* would not be necessary were that decision plainly grounded in the Constitution.[14] Even *Roe* itself was somewhat equivocal about the constitutional basis for its holding. 410 U.S., at 153 (expressing some uncertainty as to whether the announced right to have an abortion is based on the Ninth or Fourteenth Amendment).

The power to restrain private deadly violence is an essential characteristic of modern government. *Roe* bound the hands of legislatures to prevent the taking of innocent human life, with catastrophic consequences. Clearly concerns about institutional

---

first instance") (plurality opinion of O'Connor, Kennedy, and Souter, JJ.).

[13] *Id.* at 944 (Rehnquist, C.J., joined by White, Scalia and Thomas, JJ., concurring in the judgment in part and dissenting in part); *id.* at 979 (Scalia, J., joined by Rehnquist, C.J., and White and Thomas, JJ., concurring in the judgment in part and dissenting in part).

[14] It is sometimes suggested that principles of gender equality require an abortion right. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. Rev. 375 (1985); Jack M. Balkin (ed.), WHAT *ROE V. WADE* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION 63-85 (2005). Men, however, have no right to avoid the responsibilities of fatherhood once a child is conceived. *See Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (striking down law forbidding abortion without husband's consent). Taking the life of an unborn child based on his or her dependence, disability, or sex, similarly does not redress but rather creates inequality.

Bodily integrity likewise does not support a right to abortion. Neither *Roe* (410 U.S., at 153-54) nor any other decision of this Court has recognized a right of absolute control over one's own body. *E.g.*, *Washington v. Glucksberg*, 521 U.S. 702 (1997) (upholding ban on assisted suicide); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (upholding compulsory vaccination law).

integrity should not be placed above the lives of millions of innocent human beings. *See* Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 Notre Dame L. Rev. 995, 1031-32 (2003) (concluding that none of the concerns articulated by the *Casey* plurality, including institutional integrity, can justify this Court's acquiescence in the death of millions of innocent human beings).

Finally, recent medical research and scholarship on abortion continue to undermine many of the factual assumptions underlying *Roe*. The assumption that abortion is safer than childbirth (*Roe*, 410 U.S., at 150, 163) has come under serious challenge. David C. Reardon, *et al.*, *Deaths Associated with Abortion Compared to Childbirth – A Review of New and Old Data and the Medical and Legal Implications*, 20 J. Contemp. Health L. & Policy, 279 (2004). There is a significant and growing literature linking abortion with serious short- and long-term physical and mental health risks. *McCorvey v. Hill*, 385 F.3d 846, 850-51 (5th Cir. 2004) (Jones, J., concurring) (citing scientific studies which suggest that "women may be affected emotionally and physically for years afterward and may be more prone to engage in high-risk, self-destructive conduct as a result of having had abortions"); Clarke D. Forsythe & Stephen B. Presser, *The Tragic Failure of Roe v. Wade: Why Abortion Should be Returned to the States*, 10 Tex. Rev. L. & Politics 85, 108-23 (Fall 2005) (citing studies demonstrating health risks); Erika Bachiochi (ed.), THE COST OF CHOICE: WOMEN EVALUATE THE IMPACT OF ABORTION 63-100 (2004) (documenting health risks). *Roe*'s assumption that the abortion decision "will be made in close consultation with a woman's private physician" has been called into question by evidence that "women are often herded through their [abortion] procedures with little or no medical or emotional counseling." *McCorvey*, at 851 (Jones, J., concurring); *see also Women's Med. Center of Northwest*

Houston v. Archer, 159 F.Supp.2d 414, 428 (S.D. Tex. 1999) (citing abortion provider's testimony about the "cattle herd mentality" prevalent in abortion clinics), *aff'd in part, rev'd in part*, 248 F.3d 411 (5th Cir. 2001).

Roe's destructive effect on the ordinary processes of judicial review is demonstrated by the Eighth Circuit's peculiar conclusion in the instant case that Congress's findings on partial-birth abortion are simply *irrelevant*. *Carhart v. Gonzales*, 413 F.3d 791, 798 (8th Cir. 2005) ("*Stenberg* created a standard in which the ultimate factual conclusion [as to the medical necessity of partial-birth abortion] is irrelevant"); *see also National Abortion Federation v. Gonzales*, 437 F.3d at 287 (stating that it was appropriate to refrain from making any judgment concerning Congress's findings with respect to partial-birth abortion or any assessment whether those findings were supported by substantial evidence). Equally disturbing is the Eighth Circuit's conclusion that credibility determinations with respect to expert witnesses in this context are irrelevant, 413 F.3d at 802 n.5, suggesting that a "health" exception is constitutionally required even in the absence of credible evidence in the record supporting such an exception.

That the lower courts have read this Court's abortion decisions to render credibility determinations and Congressional findings "irrelevant," and that those challenging an Act of Congress have obtained relief based upon medical opinion that Congress rejected and that at least one lower court has found not to be credible, based on a showing of only speculative harm (*see* notes 5 & 7, *supra*), are among the signs that something has gone seriously wrong with this Court's abortion jurisprudence. Only this Court can correct these problems and, we respectfully submit, it needs to do so.

CONCLUSION

Respondents have failed to demonstrate, as they must to prevail, that there is a "clear incompatibility"[15] between the partial-birth abortion act and the Constitution. The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

Mark E. Chopko*
General Counsel
Michael F. Moses
Associate General Counsel
United States Conference
of Catholic Bishops
3211 Fourth St., N.E.
Washington, DC 20017
(202) 541-3300

May 22, 2006

*Counsel of Record

[15] *Legal Tender Cases*, 12 Wall. 457, 530-31 (1871); *Fletcher v. Peck*, 6 Cranch 87, 128 (1810) (Marshall, C.J.).

APPENDIX (List of *Amici*)

1. The United States Conference of Catholic Bishops ("Conference") is a nonprofit corporation organized under the laws of the District of Columbia. Its members are the Catholic bishops of the United States. The Conference is a vehicle through which the bishops speak collegially on matters affecting the Catholic Church, its people, and society as a whole. The Conference advocates and promotes the Church's pastoral teaching in such diverse areas as education, family life, health care, social welfare, immigrant aid, poverty assistance, communications, human rights, and the sanctity and dignity of human life.

2. The Ethics and Religious Liberty Commission is the moral concerns and public policy agency of the Southern Baptist Convention, the Nation's largest Protestant denomination, with over 16 million members in 42,000 autonomous local churches. The Commission is charged with addressing public policies affecting the sanctity of human life, ethics, and religious liberty.

3. The International Church of the Foursquare Gospel ("ICFG" or "Foursquare Church"), a California nonprofit corporation, was established in 1927 to propagate and disseminate the principles of Christianity embraced in the Foursquare Gospel. As a hierarchical church, ICFG operates Foursquare Gospel churches in the United States and around the world. As of the year 2005, there were 1,891 Foursquare churches in the 50 states of the United States having 260,644 members and 6,772 credentialed ministers. There are over 5 million adherents worldwide attending some 49,000 Foursquare churches.

The Foursquare Church has been on record for almost two decades in support of the sanctity of human life and, necessarily, in opposition to abortion. We view this issue as

more than just a political issue, or even a legal one. It is, at its core, a moral issue about which we will stand accountable to God for our response. We view the questions posed by the case at bar as having that significance, and so we must make our concerns known. Thus is the interest of the International Church of the Foursquare Gospel in the matter before the court.

4. The Greek Orthodox Archdiocese of America is incorporated under the Religious Corporation Act of New York. It includes 512 parishes, 20 monasteries, and 13 mission parishes serving a constituency of approximately one million people. In official resolutions, the Greek Orthodox Archdiocese is committed to defending the right to life as a treasured gift of God. The Archdiocese advocates positions consistent with these resolutions and with its teachings of nearly 2,000 years by joining in the filing of briefs in important litigation such as the present case.

5. The Lutheran Church-Missouri Synod (the "Synod") is the second largest Lutheran denomination in North America. It is composed of approximately 6,000 member congregations which, in turn, have approximately 2,500,000 baptized members. In 1998, the Synod reaffirmed its belief in the sanctity of human life, including "unborn children, whom God has woven together in their mother's wombs" (Psalm 139:13-16). It was resolved that the Synod "denounce partial-birth abortion as a barbaric procedure."